

Honorable Jacqueline Scott Corley
February 12, 2021

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February 12, 2021

VIA ELECTRONIC FILING

Hon. Jacqueline Scott Corley
United States District Court
Courtroom E – 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

**REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED**

Re: *In re Facebook, Inc. Consumer Privacy User Profile*,
Northern District of California Case No. 3:18-md-02843-VC

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Dear Judge Corley:

Pursuant to the Stipulation and Order on Discovery Dispute Resolution Procedures, Plaintiffs ask the Court to order defendant Facebook, Inc. (“Facebook”) to produce sworn testimony and written discovery responses from actions that Facebook has identified as related. Such documents are relevant to Plaintiffs’ claims and responsive to Plaintiffs’ RFP No. 43.

In November 2019, Plaintiffs issued RFP No. 6, which seeks documents Facebook provided to or received from governmental entities investigating the same conduct at issue in this case. *Montgomery Decl.*, Ex. A. at 11. In its responses and objections, Facebook agreed to produce such documents to the extent they were also responsive to other document requests propounded by Plaintiffs. *Id.*, Ex. B. at 9-10. In March 2020, Facebook provided Plaintiffs a list of ten governmental actions that met the criteria of RFP No. 6 in that they involved the same conduct at issue here. *Id.*, Ex. C. Facebook has since produced to Plaintiffs hundreds of thousands of pages from these ten actions but has declined to produce deposition transcripts or written discovery responses from those same actions.¹

In May 2020, Plaintiffs issued RFP No. 43, which seeks sworn testimony and written discovery responses from the same ten governmental actions. *Id.*, Ex. D at 11. Facebook objected to this request but represented that it was willing to meet and confer. *Id.*, Ex. E at 14-15. Pursuant to the Stipulation and Order on Discovery Dispute Resolution Procedures, Plaintiffs asked on December 10, 2020 to meet and confer. The parties then met and conferred several times. During those discussions, Facebook said that it was not aware of any written discovery responses that were provided under oath in any of the ten related governmental actions. Facebook acknowledged the existence of written discovery responses *not* provided under oath, but refused to produce them. Similarly, Facebook stated that it was aware of only one deposition that had been taken in any of the actions, but refused to produce it.

Federal courts throughout the country have acknowledged that “[m]aterials produced and deposition testimony given in other litigation is generally discoverable upon a showing of substantial similarity between the prior and current actions.” *Costa v. Wright Med. Tech., Inc.*, No. 17-CV-12524-ADB, 2019 WL 108884, at *1 (D. Mass. Jan. 4, 2019) (quoting *Town of Westport v. Monsanto Co.*, No. 14-12041-DJC, 2015 WL 13685105, at *3 (D. Mass. Nov. 5, 2015)). Courts in this District and other districts in this Circuit have concurred. *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16CV02200HSGKAW, 2017 WL 1101799, at *4 (N.D. Cal. Mar. 24, 2017) (ordering materials from a prior case produced because there was “significant factual and legal overlap”); *Munoz v. PHH Corp.*, No. 1:08-CV-0759-AWI-BAM, 2013 WL 684388, at *2 (E.D. Cal. Feb. 22, 2013) (documents produced in regulatory action ordered produced in civil suit because the regulator was “investigating the same alleged wrongful conduct as is alleged by Plaintiffs”).

¹ Facebook has also yet to supplement documents provided to regulators since its initial production. The parties continue to meet and confer on the issue.

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Here, Facebook has admitted that the ten governmental investigations involve the same conduct at issue here, first by letter and then by producing hundreds of thousands of pages from the FTC action and nine others. Indeed, Facebook took weeks to review every document it produced in the FTC action to confirm that each was relevant and responsive for this action. In the end, Facebook here produced *every page* that it produced to the FTC. April 16, 2020 Joint Statement at 12. There can be no question, then, that the sworn testimony and written discovery responses in the FTC action are also relevant here. In its March 6, 2020 letter, Facebook listed the FTC action along with the nine other governmental actions as related to Plaintiffs' claims. Montgomery Decl., Ex. C. Facebook should produce sworn testimony and written discovery responses from all of them.²

The limited correspondence that Facebook has produced from the FTC action confirms the relevance of the materials Plaintiffs seek. For example, the FTC asked Facebook to

[REDACTED]
[REDACTED] " *Id.*, Ex. F at
FB-CA-MDL-00009466. It is difficult to imagine a question more relevant to Plaintiffs' claims here. Plaintiffs are entitled to Facebook's answer.

Of note, Facebook seems to have an uncertain grasp of what went on in the ten related governmental actions. Thus, although Facebook claims that there are no sworn written discovery responses, the FTC letters demand that

[REDACTED]
[REDACTED] " *Id.* at FB-CA-MDL-00009467. Similarly, while Facebook claims that only one deposition has occurred in any of the related cases, a letter from the company's own lawyers states the company "[REDACTED]"
[REDACTED] *Id.*, Ex. G at FB-CA-MDL-00013451.

For the reasons set forth above, Plaintiffs respectfully request that the Court order Facebook to produce all sworn testimony and written discovery responses, sworn or not, from the ten related actions listed in Montgomery Exhibit C within 30 days of the issuance of the order.

² The only deposition Facebook has identified was purportedly taken in the California Attorney General's ("CA AG's") investigation into Cambridge Analytica. The CA AG has not indicated in this proceeding or to Plaintiffs that it objects to production of this material in this action. Facebook has not provided evidence that the CA AG objects to Facebook producing the transcript here, nor has it identified any statutory authority that would prohibit Facebook, as opposed to the Attorney General, from producing it.

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BLEICHMAR FONTI & AULD LLP

Dated: February 12, 2021

Respectfully submitted,

KELLER ROHRBACK L.L.P.

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Derek W. Loeser

By: /s/ Lesley E. Weaver
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Plaintiffs' Co-Lead Counsel

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Lesley E. Weaver, attest that concurrence in the filing of this document has been obtained from the other signatory. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of February, 2021 at Oakland, California.

/s/ Lesley E. Weaver

Lesley E. Weaver

CERTIFICATE OF SERVICE

I, Lesley E. Weaver, hereby certify that on February 12, 2021, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record. I also caused a copy of the under seal filings to be delivered to all counsel of record via electronic mail.

/s/ Lesley E. Weaver
Lesley E. Weaver